United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be Argued by
NANCY E. LeBLANC

74-1078

In The
UNITED STATES COURT OF APPEALS
For The Second Circuit

Docket No. 74--1078

NARCISA LOPEZ

Plaintiff-Appellee

AGAINST

HENRY PHIPPS PLAZA SOUTH, INC.

Defendant-Appellant

On Appeal From the United States District Court
for the Southern District of New York

BRIEF OF PLAINTIFF-APPELLEE

MARTIN A. HOTVET
Of Counsel

NANCY E. LeBLANC
ATTORNEY FOR
PLAINTIFF-APPELLEE
MFY LEGAL SERVICES, INC.
214 EAST 2ND STREET
NEW YORK, N. Y. 10009
777-5250

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5. Should this Court affirm the decision of the District Court granting a preliminary injunction?

PRELIMINARY STATEMENT

The decision and order appealed from were made by Judge Thomas P. Griesa of the United States District Court for the Southern District of New York. Neither the decision nor order has been published.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Southern District of New York (Griesa, D. J.), entered January 9, 1974, granting preliminary injunctive relief enjoining defendant-appellant from taking any steps to evict plaintiff-appellee and her three children from their home in Apt. 8J, 330 East 26th Street, New York, New York, pending final determination of the action, and otherwise extending the order granted on October 9, 1973 (A 102-103).* The order of October 9 enjoined defendant-appellant from taking any steps to evict plaintiff-appellee for 45 days. It provided that during the 45 day period, defendant-appellant should have the opportunity to hold another

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* In this brief, Appendix pages shall be designated A followed by the page number. Supplementary Appendix pages shall be designated SA followed by the relevant page number.

hearing to determine whether current and competent evidence existed upon which to base the refusal to renew plaintiff's lease, and that plaintiff should fully cooperate in the holding of such a hearing. The order provided that the injunctive relief should not extend to Thomas Lopez, Sr., the husband of the plaintiff-appellant. (A 84-85).

The within case was commenced on September 19, 1973. The motion for a preliminary injunction was made returnable on October 2, 1973, but the request for a temporary restraining order was denied, after argument by counsel for plaintiff and defendant. (Duffy, D. J.) (A 3-4).

The motion for preliminary injunctive relief was granted by order dated October 9, 1973, but limited to 45 days, after exchange of affidavits and lengthy argument and oral proceedings before the Court on October 2 and 4, 1973 (SA 2-65) (A 84-85). The 45 day limitation was removed by order dated January 4, 1974 (A 102-103), after exchange of affidavits and brief proceedings before the Court at which counsel for plaintiff and defendant were heard on November 29, 1973. (A 88-97), and the memorandum of the Court (A 98-101).

The notice of appeal was thereafter served and filed on January 7, 1974. (A 104). Most of the relevant facts of this case are set forth succintly in Judge Griesa's decision initially granting the preliminary injunction (A 73-83), and in the memorandum extending it beyond 45 days (A 98-101).

Plaintiff-appellee Narcisa Lopez and her three children are tenants in a housing project owned and

operated by defendant-appellant Henry Phipps Plaza South, Inc., at 330 East 26th Street, New York, New York (A 73-75). Plaintiff-appellee's sole source of support is public assistance, which pays the rent. (A 12).

Defendant-appellant is a "redevelopment company", organized pursuant to the Redevelopment Companies Law (Article 5 of New York Private Housing Finance Law). Defendant-appellant was created to build and operate a housing project for low and middle income families in the Bellevue South Urban Renewal area, pursuant to the Bellevue South Urban Renewal Plan, and financed under § 221(d)(3) of the National Housing Act, 12 USC § 1701 et seq. The City of New York acquired the land for defendant's housing project utilizing its power of eminent domain. The land was sold to defendant on May 27, 1968. A detailed agreement for the construction and operation of the project was made a part of the deed and recorded with it in the City Registry. The Redevelopment Companies Law, under which defendant is incorporated, provides for extensive supervision by New York City's Housing and Development Administration of the organization, planning, development, maintenance, and operation of defendant. Defendant's certificate of incorporation incorporates these provisions of the Redevelopment Companies Law. The certificate declares that the "company has been

formed to serve a public purpose." Defendant is wholly owned by Phipps Houses, a non-profit corporation having as its purpose the provision of housing accommodations for low income people. (Sections of Complaint, admitted in Answer, A 62-64, 71). Phipps Houses controls many projects such as defendant, (A 36).

Plaintiff-appellee and her husband Thomas entered into a lease with defendant on October 1, 1970. (A 14-18). That lease has been extended one or more times, and the last renewal expired December 31, 1972. (A 74).

Plaintiff-appellee and her husband are now separated. Due to the drunkenness and violent nature of the husband, plaintiff has no desire to live with him. (A 77). She has no way of controlling him, however. She is sickly, and is under treatment for epilepsy (SA 5). Plaintiff's attorney has personally demanded of him that he stay away. (A 77). The separation preceeded the institution of the lawsuit by about a year and a half and the husband has not lived with/or supported the plaintiff since that time. (A 11). The husband has come around the building, however, in spite of plaintiff's desires that he stay away. In March 1974, for instance, he was discovered drunk and unrully outside the building, trying to get in. (A 33, 44-45). In fact, he cannot legally be kept away. (SA 4). MFY Legal Services does not represent the husband. The preliminary injunction

does not protect him. Moreover, MFY Legal Services did not represent him at the eviction hearings. (A 24).

On January 12, 1972, defendant informed plaintiff by letter that it would not renew her lease, and that she had a right to a hearing to contest the charges made against her. (A 19-21). The letter listed thirteen incidents involving her husband or sons. No charges have ever been made against plaintiff herself. "Limited" hearings were held on February 27, March 6, and May 2 (held at the request of defendant to consider two additional charges, relating to Thomas Lopez, Sr. (A 44-45)). (A 75-76, 82).

The hearings were "limited" rather than full "evidentiary" hearings. The notice to plaintiff stated that the hearings were for the purpose of granting the tenants an opportunity to be heard in order to explain or negate the causes for the denial of lease renewal, and an opportunity to deny or explain that the landlord had not acted arbitrarily. (A 42).

The hearing examiner was Mr. John Codman, the manager of Lambert Houses, a wholly-owned Phipps Houses project in the Bronx, New York. Mr. Codman is employed by Phipps Houses Services, Inc. a non-profit corporation providing management services to housing projects sponsored by Phipps Houses, including defendant Henry

Phipps Plaza South, Inc. (A 36). Attorney for plaintiff objected to Mr. Codman as biased in fact, after he made a statement, before any evidence was taken, that the charges justified eviction (A 8-10).

No rules or regulations governing termination of tenancies were furnished to plaintiff before her hearing and none exist. (Admitted in Answer A 71).

In his decision after hearing, dated July 10, 1973, Mr. Codman sustained six charges as serious and substantial, and warranting eviction. (A 22-34). Two of the charges sustained involved drunken and unrully conduct by Thomas Lopez, Sr. Judge Griesa ruled that conduct by Thomas Lopez, Sr. would not support a determination to evict plaintiff bacause she is separated from him, trying to keep him away, and not responsible for his conduct. (A 77).

One of the remaining charges was innocuous, and not in itself serious. The only thing proved was that the police came to the apartment and when they arrived, found nothing wrong. (SA 14-15, A 29). The remaining three charges involved the two sons, Thomas and Jose. The last of the incidents occurred on December 19. Judge Griesa did not dismiss the other charges and had no doubt of the seriousness of the December 19 incident (A 78), a robbery in a book store in the building in which plaintiff

resides, although on the street level, where no residential tenants reside, and at a different address. (SA 17). However, Judge Griesa found that circumstances "may well have changed substantially since December 19, 1972". The older boy was shot during the incident. One of his testicles was shot off. His stomach was badly torn up. He had a substantial period of hospitalization and has been withdrawn "and may well have been removed from mischievous activity since that wound." He is under indictment in New York Supreme Court and is out on bail. The younger boy went voluntarily to a state camp in connection with the juvenile delinquency charges. Defendant was unable to direct the attention of the Court to any specific incidents of misconduct involving either Thomas or Jose after December 19, 1972. Furthermore, a social worker, employed by MFY Legal Services, Inc., was assigned to the Lopez household after the October 2 proceedings before Judge Griesa. He counsels the two boys and helps Mrs. Lopez. (A 78-80, 88-90, 91-92).

After Mr. Codman's decision was issued, defendant-appellant duly proceeded to evict plaintiff-appellee. On September 20, 1973 after summary proceedings in which the only issue was whether the lease term had ended, the Civil Court of the City of New York issued a final judgment against plaintiff-appellant, with issue of the warrant of eviction stayed until September 30, 1973. (A 55). The within action followed, as aforesaid.

ARGUMENT

I THE DISTRICT COURT HAD JURISDICTION, IN THAT DEFENDANT ACTED UNDER COLOR OF STATE LAW TO DEPRIVE PLAINTIFF OF CONSTITUTIONAL RIGHTS.

Jurisdiction was invoked pursuant to 28 USC § 1343, which confers original jurisdiction on the United States District Courts in actions for relief against violations of 42 USC § 1983. Under 42 USC § 1983, a person deprived of constitutional rights may bring suit at law or equity against the responsible party provided the responsible party's action may be characterized as state action.

The District Court had jurisdiction of the within case, in that Henry Phipps Plaza South, Inc. is sufficiently entangled in a "web of state involvement spun by the state" to warrant characterizing its operations as state action. Male v. Crossroads Associates, 469 F 2d 616 (2d Cir. 1972).

The Henry Phipps Plaza South, Inc. housing project was built in the Bellevue South Urban Renewal Area of New York City pursuant to the area's Urban Renewal Plan. Large contributions were made by the City to the project before construction began. The land for the project was acquired by the City through its power of eminent domain. The City was intimately involved from the very beginning in the construction and operation of the project, pursuant to the agreement made on April 25, 1968, and recorded with the

deed. Every aspect of the construction was covered by the April 25th agreement, including detailed plans and construction schedule. Henry Phipps Plaza South, Inc. is organized pursuant to the New York Redevelopment Companies Law (Article 5 of the Private Housing Finance Law). The Redevelopment Companies Law provides for extensive supervision by New York City's Housing and Development Administration of the organization, planning, development, maintenance and operation of defendant. Defendant's Certificate of Incorporation incorporates the provisions of the Redevelopment Companies Law, providing among other things, that the "company has been formed to serve a public purpose" (Certificate, Par. 17), and for pervasive regulation by the Housing and Development Administration (HDA) of the operations of the Company. For instance, the approval of HDA is necessary if income debentures are to be issued, (Certificate, Par. 13), and if funds are to be borrowed, (Certificate, Par. 14). If the company fails to comply with any requirements of HDA, HDA may remove any director or directors in office (Certificate, Par. 12). (Complaint / A 62-64, Admitted in Answer A 71)

The within case is virtually on all fours with Male v. Crossroads Associates, 469 F. 2d 616 (2d Cir. 1972) where this Court held that the conduct of defendants constituted "state action". Crossroads Associates had built a housing

complex as part of the Academy Street Renewal Plan which was developed by the Peekskill Urban Renewal Agency. The Court based its funding of state action on the large contribution to the project made by the Urban Renewal Agency before construction began and on initial and continuing intimate involvement of the Agency in the construction and, operation of Crossroads' housing project.

In Colon v. Thompkins Square Neighbors, Inc., 294 F Supp 134 (S.D.N.Y. 1968) the District Court found "state action" in the conduct of another spin-off of Phipps Houses, Thompkins Square Neighbors, Inc., a housing project financed and operated virtually identically to the way defendant-appellant is financed and operated. See McQueen v. Drucker, 438 F 2d 781 (1st Cir. 1971), Joy v. Daniels, 479 F 2d 1236 (4th Cir. 1973).

The District Court's determination that it had jurisdiction should be upheld.

II. THE DISTRICT COURT ACTED PROPERLY IN REFUSING TO ABSTAIN.

The District Court refused to abstain in the face of defendant's argument that an "Article 78 proceeding" in New York State courts could have been and therefore should have been brought in lieu of plaintiff's federal action. (A 91) Defendant-appellant criptically renews his argument upon appeal, but his position is not supported by applicable case law.

Plaintiff-appellee has raised serious and substantial claims that she was denied a proper due process hearing before defendant-appellant terminated her tenancy. It is well established that the federal courts are the "primary forum for the vindication of federal rights", and have a duty to give "'due respect' to a suitor's choice of that forum." Holmes v. New York City Housing Authority, 398 F. 2d 262, 266 (2d Cir. 1968); Escalera v. New York City Housing Authority, 425 F. 2d 853, 865 (2d Cir. 1970) cert. denied 400 US 853 (1970) /Zwicker v. Koota, 389 U.S. 241, 247-248 (1967) "Cases involving civil rights are the least likely candidates for abstention." Wright v. McMann, 387 F. 2d 519, 525 (2d Cir. 1967). 42 USC § 1983, under which plaintiff-appellee proceeds, was intended "to provide a remedy in the federal court's supplementary to any remedy any state might have," and any such state

remedy need not be first sought and refused before the federal remedy can be invoked. McNeese v. Board of Education for Com. Unit Sch. Dist. 187, 373 U.S. 668, 671-674 (1963); Monroe v. Pape, 365 U.S. 167, 183 (1961). The refusal of the District Court to abstain was clearly proper under the case law. Moreover, the District Court's refusal to abstain should be affirmed because it is well recognized in this circuit that the Article 78 proceeding does not provide an adequate forum for the consideration of constitutional claims. Holmes v. New York City Housing Authority, supra, 398 F. 2d at 267; Escalera, supra. The only questions plaintiff-appellee could raise in the Article 78 proceeding, pursuant to § 7803(3) of the New York Civil Practice Law and Rules, would be whether the determination not to renew her tenancy was "arbitrary and capricious." Fuller v. Urstadt, 28 N.Y. 2d 315, 318, 321 N.Y.S. 2d 601, 603, 270 N.E. 2d 321, 324 (1971); Colton v. Berman, 21 N.Y. 2d 322, 329, 287 N.Y.S. 2d 647, 651, 234 N.E. 2d 679, 682 (1967). Plaintiff-appellee is not here raising the question of whether the determination was arbitrary and capricious but rather she is raising the constitutional question of the procedure followed to reach that determination. Plaintiff-appellee alleges she is entitled to a due

process hearing before her tenancy can be terminated. The Article 78 proceeding does not reach these constitutional issues and therefore does not accord her the "plain, adequate, and complete remedy" which is a necessary precondition for abstention. Holmes, supra, 398 F. 2d at 267 n. 7, Potwora v. Dillon, 386 F. 2d 74, 77 (2d Cir. 1967).

The District Court's refusal to abstain should be affirmed.

III. THE PLAINTIFF HAS A PROPERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE

The District Court held that "there is a sufficient indication of a property right for me to grant preliminary injunctive relief," citing Escalera v. New York City Housing Authority, 425 F. 2d 853 (2d Cir. 1970), cert. denied, 400 US 853 (1970). (A 81).

The property right at stake is plaintiff's right to continued tenancy in defendant-appellant's housing project. This Court has held that tenants of privately owned but governmently subsidized housing projects such as Henry Phipps Plaza South, Inc. have a sufficient property interest in their tenancies to invoke the Fourteenth Amendment if that right is threatened with termination. In McGuane v. Chenango Court, Inc., 431 F. 2d 1189 (2d Cir. 1970) cert. denied 401 US 994, (1971), the Court held that a tenant of a project constructed with federal mortgage insurance assistance (§ 221(d)(3)) had a property interest within the protection of the Civil Rights Act.

> "Indeed, we decided that such an interest is within the protection of the Civil Rights Act implicitly in Holmes v. New York City Housing Authority, 398 F. 2d 262 (2d Cir. 1968) and explicitly in Escalera v. New York City Housing Authority, 425 F. 2d 853, 864-865 (1970)" [431 F. 2d at 1190].

See also McQueen v. Drucker, 317 F. Supp. 1122 (D. Mass 1970) aff'd in part 438 F. 2d 781 (1st Cir. 1971); McClellan v. University Heights, Inc., 338 F. Supp. 374 (D.RI 1972); and Caulder v. Durham Housing Authority, 433 F. 2d 998 (4th Cir. 1970), cert. denied 401 US 1003 (1971) wherein the Court based its finding of a "sufficient property interest" in the irrevocable injury which is suffered by tenants of public housing upon eviction from their subsidized low cost apartments.

And further see Joy v. Daniels, 479 F. 2d 1236 (4th Cir. 1973), wherein the 4th Circuit Court of Appeals held that the tenant therein threatened with eviction from a "§ 221(d)(3)" project had a sufficient property interest to invoke procedural due process. The Court looked to "applicable statutes, governmental regulations, and the custom and understandings of public landlords in the operation of their apartments" to determine if the threatened tenant, had "a 'property interest' in a tenancy beyond the term of the lease except for cause." Id. 479 F. 2d at 1240. The statutes and regulations cited--The National Housing Act, The Housing and Urban Development Act of 1965, The Civil Rights Act of 1964 and relevant FHA regulations (e.g. 24 C.F.R. § 221.536) --as well as the custom of public landlords to permit tenants to remain unless there is a reason for eviction, are all applicable to Henry Phipps Plaza South, Inc.,

the defendant herein. Plaintiff's history exhibits the custom. Her first lease ran until September 30, 1971, and was then renewed on one or more occasions, the last renewal having expired on December 31, 1972. (A 74). The conclusion of the Court in Joy v. Daniels is as applicable to the within case as it was there:

> In view of the congressional policies of providing a decent home (with stability and security) for every American family, and of prohibiting arbitrary and discriminatory action, bolstered by the FHA regulations and custom, we find in the scheme of the National Housing Act and the Housing and Urban Development Act of 1965 a property right or entitlement to continued occupancy until there exists a cause to evict other than the mere expiration of the lease." (Id., 479 F. 2d at 1241).

Plaintiff-appellee now enjoys a decent home at a rental she can afford on her public assistance allowance. (A 12-13). She will suffer irrevocable injury if she is evicted, one) because the shortage of decent housing available to low income and welfare families in New York City makes it unlikely she will be able to secure another decent apartment. cf. Otero v. New York City Housing Authority, 484 F. 2d 1122 (2d Cir. 1973), and two) because if she is evicted now and it is subsequently determined the eviction was improper, the space she now occupies will be re-rented and no other space is likely to be available to her. The Court in Caulder used these

factors to reach its finding that plaintiffs in that case had a property interest in their tenancy and therefore had standing to raise procedural issues in regard to the termination of their property rights.

The defendant-appellant claims plaintiff-appellee does not have such a property right relying on Board of Regents of State Colleges v. Roth, 408 US 564 (1972) and Perry v. Sindermann, 408 US 593 (1972). However, in Sindermann, the Supreme Court remanded to the District Court in order to give Sindermann, the teacher plaintiff, an opportunity to prove that even though his employment contracts were nominally only for one year at a time, there existed in reality a de facto tenure program under which a new contract would not be withheld except for cause. The Court held that proof of such a "de facto tenure" system and therefore of a "sufficient property interest" would entitle Sindermann to procedural due process before his employment was terminated, although the Courts have generally not found a "property interest" in a job. See Board of Regents of State Colleges v. Roth, supra. The Supreme Court in Sindermann stated:

> We have made clear in Roth, supra, at 577, that "property" interests subject to procedural due process protection are not limited to a few rigid, technical forms. Rather, "property" denotes a broad range of interests that are secured by "existing rules or understandings." Id. at 577. A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or

> mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. [408 US at 601].

Since plaintiff-appellee's property interest is in her right to her home, a well recognized property right, and since the Court in Sindermann found a possible property right where one year employment contracts were automatically renewed in a fashion to create a de facto tenure system, a practice similar to the automatic renewal of a tenant's yearly lease, Joy v. Daniels, supra, defendant-appellant's reliance on Sindermann and Roth appear misplaced.

The District Court's determination that plaintiff-appellee's right to continued tenancy was a sufficient property interest for her to invoke her rights to procedural due process should be affirmed.

IV PLAINTIFF HAS RAISED SERIOUS, SUBSTANTIAL AND DIFFICULT QUESTIONS REGARDING DENIAL OF PROCEDURAL DUE PROCESS

Implicit in the decision of the District Court is the finding that plaintiff-appellee was entitled to a pre-termination hearing meeting the standards set forth in Goldberg v. Kelly, 397 US 254, 266-271, (1970). (A 81). This basic finding is solidly grounded in applicable case law.

In Escalera v. New York City Housing Authority, 425 F 2d 853 (2d Cir. 1970) cert. denied 400 US 853 (1970) this Court required the New York City Housing Authority to grant "hearings" before terminating tenancies. It is significant for plaintiff-appellee's constitutional claims that this Court in Escalera refused to specifically mandate procedures, but left the task of formulating the specific hearing rights to the trial court.

> The minimum procedural safeguards required by due process in each situation depend on the nature of the governmental function involved and the substance of the private interest which is affected by the governmental action....
> (Citations). Since these competing interests have not been fully developed at the trial level, it is not now appropriate for this Court to prescribe the minimum necessary procedural requirements. (Escalera, 425 F 2d at 861).

The Court however suggested the elements of a proper hearing, which included an impartial hearing officer or decision maker, which plaintiff-appellee claims along with other rights was denied to her in the "hearing" held by the defendant-appellant. See Caulder v. Durham Housing Authority 433 F 2d 998 (4th Cir. 1970), cert. denied 401 US 1003 (1971). It is important therefore that a trial be held to fully develop the competing interests.

Henry Phipps Plaza South, Inc. is privately-owned but government subsidized housing (hereinafter referred to as quasi-public housing). Nevertheless, the hearing it must accord before terminating tenancies should not differ from the hearing required of the New York City Housing Authority by Escalera. In Joy v. Daniels, 479 F 2d 1243 (4th Cir. 1973), the Court explicitly applied the holdings of Escalera and Caulder, both involving public housing, to a landlord operating a project virtually identical in terms of financing and state involvement to defendant-appellant. Id. 479 F 2d at 1242-1243. See McQueen v. Drucker 317 F Supp 1122, 1131-1132, (D Mass. 1970) aff'd in part 438 F 2d 781 (1st Cir. 1971), McClellan v. University Heights, Inc., 338 F Supp 374 (D.R.I. 1972).

The interests of the low income tenants living in public housing and those living in quasi-public housing such as Henry Phipps Plaza South, Inc., in a hearing before

termination of their tenancies is identical, i.e. to ensure that they are evicted from what is probably the only decent housing available to them, only for good and reasonable cause properly proved. Further, the manner of financing, constructing and operating public housing and quasi-public housing makes any meaningful distinction difficult.

Only a little over fifty percent (50%) of the quasi-public housing has been built by truly private (profit-motivated) developers. Almost half, including the project involved in the within case, has been built by non-profit sponsors. Moreover, Henry Phipps Plaza South, Inc. was built and is managed under the parentage of Phipps Houses, a non-profit New York Corporation having as its purpose the provision of housing for low income people and which has built and manages through its own management corporation, thousands of apartments (A 36). Public housing is itself increasingly produced, owned and financed privately through the "Turn-key" and leasing programs. Housing authorities are now required to secure at least thirty percent (30%) of their new units in privately owned buildings through leasing. After the examination of such factors as these, a distinguished commentator in the field concluded that, for purposes of applying constitutional norms, "a distinction along programmatic lines will be difficult to maintain." Lefcoe, "HUD's Authority to Mandate Tenant's Rights in Public

Housing," 80 Yale L.J. 463, 504-506 (1971).

Given all of these facts there appears therefore to be no basis for finding a significant distinction between public housing, the subject of Escalera and Caulder and privately-owned but government subsidized housing, the subject of Joy, McQueen and McClellan.

Plaintiff-appellee was accorded a "limited" hearing by defendant-appellant. The precise due process requirements for that hearing depend on a process of weighing the competing interests of the plaintiff and defendant herein. However, the argument will proceed on the basis that the nature of the defendant-appellant's interest at stake in the within case is identical to that of the New York City Housing Authority.

Plaintiff's hearing was constitutionally deficient in at least three respects.

(a) Such a lengthy period of time separated the date of relevant tenant offenses and the actual attempted eviction as to require a new administrative hearing to substantiate the basis for eviction.

The District Court, after two lengthy oral proceedings (see SA), found that too much time had passed between the last relevant incident involving the tenant's sons, December 19, 1972, and the time of eviction, October, 1973.

The Court granted a preliminary injunction to be in effect for 45 days. During that period, defendant-appellant was to inquire through the hearing process previously employed as to the current situation existing with respect to plaintiff Lopez and her children. (A 80-82). When no further hearings were held, the preliminary injunction was extended to the final determination of the action (A 101).

The Court's determination was predicated upon two factors, and in both, the Court's decision was soundly based. First, the Court held that the charges against Thomas Lopez, Sr. should not be relevant to the determination of whether or not to terminate plaintiff-appellant's tenancy because Thomas Lopez, Sr. was separated from plaintiff-appellant, (did not support her (she is receiving welfare)), did not live with her, and plaintiff-appellant "very much" desired and needed the separation. (A 77-78). The finding of separation has ample support in the record, including the sworn statement of plaintiff-appellant (A 11), the fact that Thomas Lopez was not a party to the within action, nor represented by MFY Legal Services, Inc., at the termination hearings, although he was present (A 24), and the representations of counsel that there is no desire by plaintiff to live with her husband further and that counsel has demanded of him that he stay away. (A 77-78, SA 2-6, 25-26).

Moreover, the legal conclusion drawn by the Court that plaintiff Lopez should not be held accountable for the acts of her husband, over whom she had no control has ample support in the case law. In Tyson v. New York City Housing Authority, _____ F Supp _____ (S.D.N.Y. 1974), 42 USLW 2384 (1/29/74), the district court held unconstitutional the eviction by the New York City Housing Authority of a tenant solely because her adult son who didn't live with her had committed a criminal act. The court based its holding on the long accept proposition that it is unconstitutional to impose liability on a person on the basis of associations. If a person is to be found liable, he must bear some personal responsibility for the acts leading to liability.

In Weber v. Aetna Casualty & Surety Co., 406 US 164 (1972) relied upon in Tyson, the Supreme Court struck down as unconstitutional a Louisiana statute that deprived illegitimate children of workmen's compensation, but not legitimate children. The Court held that it was unjust to place burdens on illegitimate children since they were in no way responsible for their status. The Supreme Court declared:

> imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. (Weber, 406 US at 175).

Plaintiff-appellee bears no responsibility for her husband's acts. She is a sick, "very drawn" woman, under treatment for epilepsy (SA 5) and hardly able to physically restrain her husband. There is nothing in the record to indicate that plaintiff-appellee directly and herself has done anything wrong (SA 9). It would be unjust to penalize her for the undesirable acts of Thomas Lopez, Sr., presumably the very kind of acts which led to the separation in the first place (see SA 47-48). Tyson, supra and Weber, supra, support the district court finding that Thomas Lopez, Sr.'s acts should not prejudice plaintiff appellee and may not serve as a basis for the termination of her tenancy.

The second factor in the analysis of the district court was the lengthy delay between actual attempted eviction in October 1973, and the last undesirable act of plaintiff-appellee's sons on December 19, 1972. While eviction may have been justified in December, 1972, or a reasonable period of time thereafter, it was not justified in October, 1973. It is a familiar proposition in the law that undue delay can prejudice a proceeding. Parties guilty of laches can lose their rights and quasi-governmental housing agencies must act expeditiously, in order to avoid undue injury to poor people. In Colon v. Thompkins Square Neighbors, 294 F Supp. 134 (S.D.N.Y. 1968) the defendant housing corporation was ordered to establish a "reasonable time limit"

within which to complete its investigation of applications and to notify applicants "in order to avoid keeping applicants in a state of indefinite suspension" to their prejudice, both with respect to seeking remedies if rejected and also with respect to taking advantage of other alternative living situations. (Perhaps less desirable than Thompkins Square but more desirable than their present housing. Cf. Holmes v. New York City Housing Authority, supra.

Plaintiff was not responsible for the lengthy delay between December 19, 1972, and October, 1973. Circumstances had substantially changed by October 1 in that the husband was separated from her and her sons had not been accused of any misdeeds since December and there was reason for the court to believe they might have reformed. Furthermore, an experienced social worker from MFY Legal Services was assigned to help the family and the boys in particular (A 72-73). If there was reason to evict Mrs. Lopez in December, 1972, that reason had evaporated by October, 1973. Moreover, it was defendant-appellant's laches which caused the delay. Therefore, in October, it was appropriate for the District Court to question whether there was good reason to evict. If there was no substantial reason, then plaintiff would be deprived of her tenancy arbitrarily. Arbitrary state action is by definition in conflict with the Fourteenth

Amendment. The District Court's finding that the December, 1972, acts could not constitutionally substantiate an October, 1973, eviction is warranted by the record in this case and by case law and should be upheld.

(b) The Hearing Officer Was Not Impartial Within the Meaning of Due Process.

One of the basic elements of due process is an impartial hearing officer. Goldberg v. Kelly, supra, 397 U.S. at 271. The requirement of an impartial hearing officer is applicable to the hearing held in this case to determine whether the charges justified the termination of plaintiff-appellee's lease. Escalera, supra, 425 F 2d at 863. Caulder, supra, 433 F 2d at 1004.

The hearing officer, John Codman, displayed his bias against plaintiff-appellee by stating that the charges justified the termination of her lease before he had heard any of the evidence. (A 8-10). Bias as regards the facts has been held to require the disqualification of the hearing officer. American Cyanamid Co. v. FTC, 363 F 2d 757 (6th Cir. 1966), Texaco, Inc. v. Federal Trade Commission, 118 App. D.C. 366, 336 F 2d 754, 760 (D.C. Cir. 1964) vacated and remanded on other grounds, 381 U.S. 739 (1965). Mr. Codman's statement was at the least indiscrete and improper. Plaintiff-appellee's attorney believed it indicated bias and a predisposition tc rule in favor of the landlord. (A 9-10).

Mr. Codman's indication of prejudgment might not be constitutionally consequential, except for Mr. Codman's position as a manager in the Phipp's system. Specifically Mr. Codman was employed as the manager of Lambert Houses by Phipps Houses Services, Inc., the corporation set up by Phipps Houses to supply management services to all of the projects it sponsored and developed in New York City. Defendant-appellant is one such project and is also managed by Phipps Houses Services. Defendant-appellant, in his affidavit in opposition argued that Mr. Codman's position was sufficiently separate from the manager of defendant-appellant, who made the initial decision to evict plaintiff, as to prove his impartiality. But the very words of the affidavit underscore the legitimacy of plaintiff-appellee's concerns about his bias.

> "In fact, outside of holding highly similar responsible positions in similar projects under the aegis of a charitable foundation sponsoring, constructing and operating many projects affording decent housing to persons of low income, there is no connection between them (the project managers of separate projects) and no basis for any claim of suspicion or prejudice." (A 36)

Mr. Codman was not simply a hearing examiner in the Phipps system. He was a project manager holding the same position in Lambert Houses as Mary Fehrenbach, the manager in the within case. He may be presumed to be ambitious to advance in the system. In any case, he was in every sense

a "management man" holding a "highly responsible" management position. He would not ordinarily be especially sensitive to the needs or severe problems of families such as plaintiff-appellee's. While the District Court herein found that Mr. Codman had made "a careful and objective" analysis, it is significant that the truly impartial judge wanted the facts reexamined. Perhaps the difference was that Mr. Codman was a management man, while the judge was in fact impartial.

Mr. Codman's status as a manager in the Phipps Houses system disqualifies him as an impartial hearing examiner as required by due process. In D'Elia v. New York, New Haven and Hartford Railroad, 338 F. 2d 701 (2d Cir. 1964), affirming 230 F. Supp. 912 (D. Conn. 1964), it was accepted that a management employee of the employer railroad could not be a "completely impartial" hearing officer within the meaning of due process in an employee suspension case. And in Hornsby v. Dobard, 291 F. 2d 483 (5th Cir. 1961) the 5th Circuit Court of Appeals reversed and remanded to the District Court which had dismissed the plaintiff's case. The Court of Appeals held that the employee should have the opportunity to prove his claim that the union representatives on the National Railroad Adjustment Board were "his adversaries from whom he could not expect to receive a fair and

impartial hearing." The employee had been deprived of his due process right to an impartial hearing board if he could show

> that the union representatives on the Board have such personal interests arising out of their union memberships or employment, or from the agreement between the union and the carrier as would justify an inference of bias or partiality by reason of interest ... (Id., 291 F. 2d at 487)

See 2 Davis, Administrative Law Treatise, § 12.03 pp. 153-161 (1958).

Mr. Codman's status as a manager differentiates the within case from the administrative proceedings conducted by governmental agencies and vitiates defendant's defense that plaintiff's claim if accepted, would "cast doubt on the due process" afforded in all governmental administrative proceedings presided over by agency personnel./ (A 36-37) The key factor is not who pays the hearing examiner's salary, but rather the hearing examiner's position in the hierarchy of the agency and thus his "interest". See Hornsby v. Dobard, supra; Glass v. Mackie, 370 Mich. 482, 122 N.W. 2d 651 (1963).

The proper standard of impartiality is codified in the HUD circular governing evictions from public housing projects, RHM 7465.9 (2/22/71). The circular requires a hearing before an "impartial" officer or a hearing panel before eviction. If the Housing Authority sets up a panel, it must include an equal number of

representatives of the Authority and of the tenants with one impartial member. The Model Grievance Procedure which is the part of the circular embodying these requirements specifies that "the impartial or disinterested member of the panel may not be an officer or employee of the LHA (Local Housing Authority) or any of its projects, nor a tenant of the LHA." HUD circular 7465.9 p. 3. It is implicit in the circular that, if no panel is set up, the "impartial officer" conducting the hearing will meet the same standards as the "impartial member" of the panel, to wit, he cannot be an employee of the Authority.

No court has explicitly held that this curcular embodies the standards of due process of law. But such a proposition was implied in Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969) where reliance on a HUD circular requiring notice and other procedures before eviction enabled the Supreme Court to avoid the constitutional issue. Compare Escalera, supra, where much more extensive hearing rights were required.

The circulars have been upheld in part because courts have been unwilling to interfere with the "informed judgment of an expert administrative body." Housing Authority of City of Omaha, Neb. v. United States, HA., 468 F. 2d 1, 7 (8th Cir. 1962) cert. denied 410 U.S. 927 (1963). HUD has determined that the burden on

Housing Authorities of retaining independent hearing examiners is not too great a financial or administrative burden when weighed against the need of tenants to keep their apartments unless they are found to be undesirable after a truly fair proceeding.

Mr. Codman does not satisfy the requirements of such cases as Hornsby, supra, or of HUD circular RHM 7465.9. The hearing presided over by him denied plaintiff-appelle due process because he was not properly disinterested. And at the very least plaintiff-appellee is entitled to a trial on the issue of his impartiality.

(c) No Regulations Setting Standards Governing Refusal to Renew Leases were made Available to Plaintiff Prior to the Hearing and None Exist.

The failure of defendant to promultage regulations setting standards governing the refusal to renew leases and to disclose such regulations to plaintiff prior to her hearing deprived her of due process of law. Defendant-appellant admits the nonexistence of such regulations in its answer. (A 71). The District Court referred to Paragraph 9 of tenant's lease, (A 74) apparently holding that this lease clause satisfied any constitutional necessity for regulations.

In the first place, there is no evidence that

plaintiff-appellant ever was able to understand or had any input whatsoever into the drafting of the clause. She is uneducated, and only Spanish speaking. (A 75). She should not lose her right to be apprised of the standards governing termination of tenancy because of a lease provision buried in a long, complicated lease. (See lease at A 14-18).

In Gonzalez v. Hidalgo City, Tex., 42 U.S.L.W. 237 (12/26/73) the 5th Circuit Court of Appeals held that the Housing Authority of Hidalgo City could not enforce the provision of a tenant's lease. The provision contained in the Authority's form lease gave the Authority the right to summarily possess the tenant's belongings if he failed to pay his rent. The plaintiff was an uneducated, non-English speaking migrant farm worker. The Court found that the parties were far from equal and that there had been no bargaining over the contractual terms contained in the lease. Even though the City contended that the provision had been fully explained to Gonzalez, the Court held that Gonzalez could not be held to have voluntarily waived his right to a prior notice and hearing.

Plaintiff-appellee was no more apprised of the standards governing termination of her tenancy by Paragraph 9 of her lease than Gonzalez was apprised of the

possibility of loss of his property by his lease. Nor is there any testimony in the record that defendant-appellant ever explained Paragraph 9 to the plaintiff-appellant. Moreover defendant-appellant in its answer admitted that it did not have regulations governing termination of tenancy (A 71). Therefore the reliance by the District Court on Paragraph 9 as providing the required regulation was ex post facto, and cannot be substituted for defendant-appellant's original failure to promulgate and make known to its tenants the regulation governing termination of tenancy.

In the second place, the District Court's reliance on Paragraph 9 is misplaced in that Mr. Codman at no time in his decision after hearing referred to Paragraph 9 as the standard. The standard he relied on was the "health, safety, and well-being of the other occupants of the development". (A 34). This standard in itself is not substantively objectionable. What is objectionable constitutionally is the failure of defendant to promulgate this standard in the form of regulations, sufficiently complete and developed as to constitute "ascertainable standards." It is established law that applicants may not be denied housing except in accordance with "ascertainable standards." Holmes v. New York City Housing Authority, 398 F. 2d 262, 265 (2d Cir. 1968);

Colon v. Thompkins Square Neighbors, 294 F. Supp. 134 (S.D.N.Y. 1968)

It is also settled law that the state may not, consistent with the due process clause, deprive its citizens of liberty or property on the basis of their conduct where no standard of conduct by which they may be guided is specified. A state requirement that a loyalty oath had to be signed deprived a teacher of due process where he would have been subject to perjury had he signed and would have lost his job had he refused to sign and the oath was so vague as "to be really no rule or standard at all." Cramp v. Board of Public Instruction of Orange County, Fla., 368 U.S. 278, 287 (1961). Penal statutes are struck down as "void for vagueness" when they are so vague that "no standard of conduct is specified at all." Coates v. City of Cincinnati, 402 U.S. 611 (1971), Papachristou v. City of Jackson, 405 U.S. 156 (1972), Lanzetta v. New Jersey, 306 U.S. 451 (1939). In the instant case, defendant refused to renew plaintiff's lease on the basis of no previously promulgated rules or standards at all.

The absence of such standards vitiated plaintiff's hearing, for there were no "rules" upon which hearing officer Codman could make his decision. One element of due process is that the "decision Maker's conclusion...

must rely solely on the legal rules and evidence adduced at the hearing." Goldberg v. Kelly, supra, 397 U.S. at 271, Escalera v. New York City Housing Authority, supra, 425 F. 2d at 863.

The District Court should have found that defendant-appellant's failure to promulgate regulations setting standards governing the refusal to renew leases and to disclose such regulations to plaintiff-appellant prior to her hearing deprived her of due process. At the very least plaintiff-appellee is entitled to a trial on the issue of what ascertainable standards, if any, defendant-appellant had.

V. THE GRANTING OF PRELIMINARY INJUNCTIVE RELIEF SHOULD BE AFFIRMED.

The granting of the preliminary injunction by the District Court should be affirmed on appeal, since the District Court did not abuse its discretion in granting the injunction.

The District Court did not abuse its discretion because the two-fold requirements for a preliminary injunction were present: a showing that irreparable harm will result if relief is denied, and a demonstration of probability of success on the merits. Plaintiff-appellee clearly would have been irreparably harmed if the injunctive relief had not been granted. Defendant has secured a final judgment of eviction from the Civil Court of the City of New York. (A 55). Only the preliminary injunction of the District Court prevents plaintiff-appellee's eviction from her apartment. At stake for plaintiff is a decent apartment and the relative stability of her homelife. If she is evicted, it is most unlikely that she will be able to find comparable housing. See the discussion of irreparable injury, supra, pp. 18-19.

Balanced against the irreparable injury to plaintiff-appellant is the negligible injury to defendant if plaintiff-appellee remains in her apartment. The

basis of the grant of the preliminary injunction was the District Court's finding that there was no current basis for evicting plaintiff, in that the "action taken to evict plaintiff was based in large part upon obsolete facts, and defendant had taken insufficient steps to obtain and consider current information. (A 99). The District Court found no untoward conduct on the part of the Lopez family "in recent months". Indeed, the preliminary injunction was originally limited to 45 days, but was extended by order dated January 4, 1974. No new incidents were reported to the judge in the hearing on extending the time period and this was a major factor in the extention of the 45 day period. (A 98-101). The Court of Appeals must accept the District Court's findings of fact, unless clearly erroneous, FRCP Rule 52A. Unicon Management Corp. v. Koppers Company, 366 F. 2d 199, 202 (2d Cir. 1966). There is ample support in the record for the finding that the situation of the Lopez family had changed. On the basis of the District Court's finding of fact, the equities clearly shift in plaintiff-appellee's favor. Moreover, as long as the plaintiff remains in possession she continues to pay "rent" as use and occupancy, and therefore, defendant is not damaged monetarily.

Plaintiff-appellee is not only subject to irrevocable injury, but her claims have the requisite probability of success to sustain the preliminary injunction. In Gulf & Western Indus., Inc. v. Great A & P Tea Co., Inc., 476 F. 2d 687 (2d Cir. 1973) this Court declared:

> '(W)here the balance of hardships tips decidedly toward the party requesting the temporary relief,'... [the Court of Appeals will not reverse the granting of the preliminary injunction if the moving party] 'has raised questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation and thus for more deliberate investigation.' Unicon Management Corp. v. Koppers Co. 366 F. 2d 199, 205 (2d Cir. 1966); Dino De Laurentus Anematografica S. p. A. v. D-150, Inc., 366 F. 2d 373, 375 (2d Cir. 1966); Hamilton Watch Company v. Benrus Watch Company, 206 F. 2d 738, 740 (2 Cir. 1953)' [476 F. 2d at 692-693].

Plaintiff-appellee has raised serious substantial, and difficult questions going to the merits which may be determined only after litigation. Only a full trial can air the facts necessary to determine whether, at the time defendant-appellant attempted to evict plaintiff, its factual basis for the eviction was obsolete. Moreover, only after a full trial will all the necessary facts regarding the hearing examiner, Mr. Codman, be developed and an opportunity given to ascertain whether or not he, in fact, met the standard of "impartial".

There has not as yet even been discovery. Plaintiff-appellee should have the opportunity to show at trial that Mr. Codman's interest as a manager of Phipps Houses was such that plaintiff-appellant could not receive a constitutionally fair hearing from him. See Hornsby v. Dobard, supra, 291 F. 2d at 487.

Only a full trial can air all the facts regarding the prejudice to plaintiff of defendant's failure to promulgate regulations governing termination of tenancies. Plaintiff should have the opportunity to show that the regulations must be promulgated and made "available" to plaintiff before attempted eviction. See Escalera, supra, 425 F. 2d at 863.

In upholding the granting of the preliminary injunction the Court of Appeals should recognize the substantial public interest in the resolution of the issues before the District Court. The "general goal of both national and state housing programs is to provide for necessitous persons a decent home and a suitable environment". These goals will be frustrated if evictions take place without tenants being afforded a fair hearing to determine whether their eviction is justified. McQueen v. Drucker, supra, 317 F. Supp at 1130. Although plaintiff did not bring her case as a class action, the resolution of her case will have a direct impact on the

rights of the thousands of other families living in quasi public housing, who may at some time in the future be faced with a termination of their tenancy. Courts of equity are permitted to go further in the exercise of their equitable powers when public interest rather than purely private interest is involved. Yakus v. United States, 231 U.S. 414, 441 (1944); Gulf & Western Indus., Inc. v. Great A & P Tea Co., Inc., supra, 476 F. 2d at 698-699.

The decision of the District Court not to receive live testimony, and its reliance upon affidavits and the representations of counsel were proper in this case. While live evidence is preferred, it is not necessary. Defendant-appellant did not request live testimony, although his project manager was present in court, as were plaintiff-appellee, her son, and the social worker employed by MFY Legal Services, Inc. (SA 24-25, 53-54). When the District Court suggested that evidence be put into the record, plaintiff's attorney responded that she had a lengthy report involving a number of people, and she was unable to get them all to Court. The judge then requested that the attorney make her report. (SA 25). Defendant's attorney relied on his affidavits and representations as well, and did not attempt to put his project manager on the stand. (SA 43-59).

Nor did he object to the report made by plaintiff's counsel. In this context of the case, the defendant-appellant may not benefit if the procedure employed by the District Court was less than ideal. "A party who chooses to gamble on that procedure cannot be heard to complain of it when the decision is adverse." Semmes Motors, Inc. v. Ford Motor Company, 429 F. 2d 1197, 1205 (2d Cir. 1970).

The District Court met the two-fold requirements for granting a preliminary injunction and should not be reversed by the Court of Appeals.

CONCLUSION

For all the foregoing reasons, plaintiff-appellee requests that this Court affirm the order of the District Court granting her a preliminary injunction.

Respectfully submitted,

NANCY E. LeBLANC
Attorney for
Plaintiff-Appellee

STATE OF NEW YORK, COUNTY OF NEW YORK ss.: AFFIDAVIT OF SERVICE BY MAIL

DAMARIS PEÑA

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 55 Mount Hope Place, Bronx, New York 10453

That on the 1st day of May 19 74 deponent served the within Brief of Plaintiff-Appellee upon WHITEHORN & DELMAN attorney(s) for Defendant-Appellee in this action, at 355 Lexington Avenue, New York, N.Y. 10017 the address designated by said attorney(s) for that purpose

by depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this 4 day of May 19 74

MARTIN ATWOOD MOYER